The District Court sustained the claims of the Lessee-Producers and the Helex Group with respect to the meaning and effect of the oil and gas leases and entered a judgment dismissing the Landowners' claims. The Landowners appealed this decision to the Court of Appeals which affirmed the District Court judgment.

The District Court dismissed the claims of the Lessee-Producers to payment for the helium constituent of the gas streams. This decision of the District Court was separately appealed by the Lessee-Producers and in such appeal the Court of Appeals reversed the District Court and directed the entry of judgment in favor of the Lessee-Producers with the direction that royalties should be paid on any sums received by the Lessee-Producers for the helium constituent. The Landowners took no part in this appeal.

ARGUMENT

1.

The Petition Is Untimely

The judgment of the Court of Appeals was entered March 2, 1971 (A. 185). On March 9, 1971, upon motion of the Helen Group, the Court of Appeals entered an order enlarging the time for filing a petition for rehearing until April 12, 1971.

The Landowners did not file a petition for rehearing. Nor did they file a petition for certiorari or apply to a Justice of this Court for an extension of time to do so within the ninety days allowed by 28 U.S.C. § 2101(c), despite the fact that twenty days of this period remained when, on May 11, 1971, the Oklahoma Supreme Court handed down the decision on which they now rely (A. 193).

On June 1, 1971, the Landowners filed a motion for leave to file a petition for rehearing out of time (A. 187), which motion was denied on June 9, 1971, because it was untimely (A. 192).

The Landowners' petition for certiorari was filed August 11, 1971, more than one hundred sixty days after the judgment was entered.

Although the Helen Group filed timely petitions for rehearing, which were denied on May 20, 1971 (A. 186), those petitions were directed only to the part of the judgment of the Court of Appeals which reversed the dismissal of the claims of the Lessee-Producers. They were not directed to the part of the judgment which affirmed the dismissal of the Landowners' claims. That part was favorable to the Helen Group as well as the Lessee-Producers.

The statute, 28 U.S.C. § 2101(c), places specific limitations on the time within which a party may seek a writ of certiorari to review the decision of a Court of Appeals. The statute is not tolled ". . . because some event occurred in the local court after judgment was rendered which is of no import to the matters to be dealt with on review." *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Company*, 344 U.S. 206, 213 (1952).

The Court of Appeals judgment with respect to the rights granted by the leases to the Lessee-Producers was not questioned in any petition for rehearing. To the extent that the decision of the Court of Appeals passed upon the license granted by the leases, it was favorable to the parties who petitioned for rehearing in the Court of Appeals.

Upon these facts, the petition for certiorari of the Landowners is untimely unless the time for filing it was tolled by their motion for leave to file a petition for rehearing out of time or by the petitions for rehearing of the Helex Group. Since the Court of Appeals denied the motion of the Landowners because it was untimely and did not consider the petition for rehearing which they sought to file, the denial of the motion did not suspend the finality of the judgment against the Landowners. *Gypsy Oil Co.* v. *Escoe*, 275 U.S. 498 (1927). Since the petitions for rehearing of the Helex Group did not ask for a reconsideration of the adverse judgments against the Landowners, it should not excuse the failure of the Landowners to champion their own rights by filing a timely petition for rehearing of the judgments against them.

It would appear therefore that the petition of the Landowners is untimely and should be denied.

2.

The Action of the Court of Appeals Is Not in Conflict With the Decisions of Any Other Circuit.

The petitioners' attempt to create a conflict between the decision of the Tenth Circuit and the decisions of the Fifth and Ninth Circuits and of this Court is contrived. The decisions from other Circuits cited by petitioners reflect instances in which those Courts saw fit to amend or vacate their judgment for reasons which they deemed sound. In the instant case the Court did not hold that it could not in proper circumstances do the same. It simply found no reason to do so here and chose to apply the rules of appellate procedure as promulgated. We fail to discern the alleged conflict. Moreover, petitioners make an unwarranted assumption when they refer to a "controlling decision" of a state court, as we shall demonstrate.

3.

The Court of Appeals Correctly Applied the Law of Texas, Oklahoma and Kansas.

Contrary to petitioners' statement, the intent of the parties to the oil and gas leases granted by the Landowners was determined as a matter of fact by the District Court and this decision was affirmed by the Court of Appeals, all on the basis of a voluminous record. Following some forty-three days of trial, a major portion of which was devoted to the reception of evidence of the facts and circumstances surrounding the execution of the leases, the District Court concluded:

> "In view of the circumstances existing at the time of the lease executions, the definition and usage of terms

> within the industry, *and by the intention of the parties as disclosed by their actions,* the court concludes that the grant of gas in each of the leases herein extends to the entire gas stream which emerges at the wellhead absent an express reservation of any constituent products, and that helium passes thereunder unless expressly reserved." (Emphasis supplied.) (A. 102).

The Court of Appeals affirmed, stating that "We believe that it is a fair interpretation of the cases just cited to say that in the three states intent is a question of fact. A plethora of evidence was received on the point" (A. 160). In so doing, the Court of Appeals emphasized the general intent of the lessors to profit through receipt of royalties on whatever component of the commingled gas streams might prove valuable, saying ". . . General intent is closer to original intent than is specific intent which blossoms when a component previously regarded as an impurity becomes valuable" (A. 164). The Court concluded that ". . . absent specific reservations, the grant of gas by the leases covered all components of the gas, including helium." *Id.*

The decision of the Oklahoma Supreme Court,[1] upon which the Landowners rely to secure untimely review of the decision of the Court of Appeals, construes two Oklahoma mineral deeds and holds that both cover oil and gas including all of their companents, but that one clearly does not cover metallic ores and metallic minerals, and that the other is ambiguous in this respect. The decision does not relate to commingled helium, and has nothing whatever to do with the construction of Texas and Kansas oil and gas

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[1] *Panhandle Cooperative Royalty Co., et al.* v. *Cunningham, Ex'x, et al.,* 42 Okla. Bar J. (A. 193).

leases. The opinion does discuss five of the so-called Oklahoma "casinghead gas" cases, and points out that the controversies which they involved would not have arisen if both the granting and royalty clauses of the leases had included the term "minerals" in addition to the term "oil and gas."

Two of these cases hold that the lease covered casinghead gas even though the term "minerals" was not used in the gas royalty clause, *Withington* v. *Gypsy Oil Co.*, 68 Okla. 138, 172 Pac. 634 (1918); *Wolf* v. *Blackwell Oil & Gas Co.*, 77 Okla. 71, 186 Pac. 484 (1920). The opinion does not cite or discuss, much less question or overrule, the line of decisions which hold that casinghead gas is covered when the royalty clause provides for payment of royalty thereon even though only "oil and gas" are named in the granting clause, *Wilson* v. *King-Smith Co.*, 119 Okla. 256, 250 Pac. 90 (Okla. 1926); *Musselem* v. *Magnolia Petroleum Co.*, 107 Okla. 173, 231 Pac. 526 (Okla. 1924); *Paulter* v. *Franchot*, 108 Okla. 130, 235 Pac. 209 (Okla. 1925). In our cases the Lessee-Producers have always acknowledged, and the Court of Appeals has held, that we are obligated to pay royalty upon whatever value of commingled helium we recover out of the interpleaded funds..

These Oklahoma casinghead gas cases were fully considered by both the District Court and the Court of Appeals and also by the Court of Claims in *Navajo Tribe* v. *United States*, 364 F.2d 320 (Ct. Cls. 1966). All of them held that a lease which covers "oil and gas" covers commingled helium as well as the other components of the gas and that the Oklahoma casinghead gas cases do not support a different result. Therefore the Oklahoma decision that the min-

eral deeds which it construed covered oil and gas but not hard metals and ores does not conflict with the decision below and does not afford any basis for the untimely filing of the Landowners' petition.

CONCLUSION

Not only is the petition untimely, petitioners present no sound reason for the issuance of a writ of certiorari by this Court. The decision of the Court of Appeals is in accord with existing decisions, does not conflict in any way with any federal or state decision or statute and gives effect to a fully supported factual determination by the trial court. The petition should be denied.

Respectfully submitted,

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